No. 82-6614

RECEIVED
APR 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
APR 13 1983
Alexander L. Stevas, Clerk

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

JURISDICTIONAL STATEMENT

LUIS G. STELZNER
MICHAEL B. BROWDE
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5326
(Counsel of Record)

WILLIAM H. CARPENTER
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

TIMOTHY SHEEHAN
PO Box 271
Albuquerque, NM 87103
(505) 247-0411

OF COUNSEL

JOAQUIN G. AVILA
MORRIS J. BALLER
JOHN E. HUERTA
Mexican American Legal
Defense and Education Fund
28 Geary Street
San Francisco, CA 91204

Counsel for Appellants

QUESTION PRESENTED

Whether the exclusive remedy provision of the New Mexico Workmen's Compensation Act, construed by the New Mexico Supreme Court to deprive non-resident alien dependents of any relief or compensation for the negligent death of a worker, violates due process, equal protection, or federal supremacy as guaranteed by the United States Constitution?

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
The Questions Presented are Substantial	5
Argument:	
POINT I.	
IF THE OPINION OF THE STATE SUPREME COURT IN THIS CASE IS ALLOWED TO STAND IT WILL HAVE WIDE-SPREAD AND PERNICIOUS CONSEQUENCES	6
POINT II.	
AS CONSTRUED BY THE SUPREME COURT OF NEW MEXICO, THE EXCLUSIVE REMEDY PROVISION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT	7
POINT III.	
THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION OF THE WORKMEN'S COMPENSATION ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT	11
A. Mr. Talamantes' Equal Protection Interests Are Implicated By This Construction of the Exclusive Remedy Provision	12
B. Because It Creates a Classification Based on Alienage, the Court's Opinion's Construction Violates the Equal Protection Clause	12
C. The Classification Created by the Opinion Below is Arbitrary and Irrational and Fails Even Under the "Rational Basis" Test	14
POINT IV.	
THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION	14
A. The Court's Construction Is In Conflict with Controlling Federal Treaties	14

Page

B. The Court's Construction Interferes with the Federal Government's Exclusive and Plenary Control Over Immigration Policy 16

Conclusion 18

Appendix A A-1

Appendix B B-1

Appendix C C-1

Appendix D D-1

Appendix E E-1

Appendix F F-1

TABLE OF AUTHORITIES

CASES:

Anaya v. N.M. Steel Erectors, Inc., 94 N.M. 370, 610 P.2d 1190 (1981) 11

Arnett v. Kennedy, 416 U.S. 134 (1974) 8

Boddie v. Connecticut, 401 U.S. 371 (1971) 7, 8, 9

Gallup American Coal Co. v. Lira, 39 N.M. 496, 50 P.2d 430 (1935) 13

Graham v. Richardson, 403 U.S. 365 (1971). . . 11, 13, 17, 18

Gutierrez v. Kent Nowling Construction Co., 22 N.M. S. Bar Bull. 351 (1983). 4, 10

Jalifi v. Arizona Industrial Commission, No. 82-245, 51 U.S.L.W. 3286 (1982) 7

Kolovrat v. Oregon, 366 U.S. 187 (1961). 14

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). 7, 8

Martinez v. California, 444 U.S. 277 (1980). 7, 11

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). 7

Natseway v. Jojola, 56 N.M. 793, 251 P.2d 274 (1952). 12

Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980) 4, 11, 13

Perez v. HSSD, 91 N.M. 334, 573 P.2d 689 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978). 14

Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382 (1982) 11, 13, 14

Royster Guano v.Virginia, 253 U.S. 412 (1920). 14

Page

Stang v. Hertz, 81 N.M. 348, 467 P.2d 14 (1970) 12

Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (1982) 13, 17, 18

Torres v. Sierra, 89 N.M. 441, 553 P.2d 721, (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976) 8, 10

Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 150 (1938) 8, 10, 11

United States v. Carolene Products, 304 U.S. 144 (1938) 13

Vitek v. Jones, 445 U.S. 480 (1980). 8

Weinberger v. Wiesenfeld, 420 U.S. 636 (1975). 12

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. I, § 8, cl. 4 . . . . . 2, 6, 17

U.S. Const. art. VI, cl. 2 . . . . . 2, 6

U.S. Const. amend. XIV 2

28 U.S.C. § 1257(2). 1

28 U.S.C. § 2403(b). 2

Ala. Code § 25-5-52, -53 (Cum. Supp. 1981) 5

Ariz. Rev. Stat. Ann. § 23-1046(c) (1982). 6

Del. Code Ann. tit. 19, § 2333 (Rev. Pam. 1974). 7

Fla. Stat. Ann. § 440.16(7) (Cum. Supp. 1981). 6

Ga. Code Ann. § 114-413(e) (Cum. Supp. 1982) 6

Ill. Rev. Stat. ch. 48, § 138.7(1) (Cum. Supp. 1982) 7

Kan. Stat. Ann. § 44-51-(b)(i) (Supp. 1980) 6

N.M. Stat. Ann. §§ 41-2-1 to 41-2-3 (1978) 2, 3, 9

N.M. Stat. Ann. §§ 52-1-1 to 52-1-69 (1978). 4, 5, 10

N.M. Stat. Ann. § 52-1-8 (1978). 2, 3, 10

N.M. Stat. Ann. § 52-1-9 (1978). 2, 3, 10

N.M. Stat. Ann. § 52-1-52 (1978) 2, 4, 10, 13

Utah Code Ann. § 35-1-72 (Repl. Pamp. 1974). 7

Page

OTHER AUTHORITIES:

W. Prosser, The Law of Torts § 902 (4th ed. 1971). 12

Convention Between the United States and Mexico Respecting the Duties of Consular Officers, 57 Stat. 800 (1942). 16

Stelzner, Precis of Wayne Cornelius's "Mexican Migration to the United States -- Causes, Consequences, and United States Responses," In the Problems of the Undocumented Worker 15 (GPO 1981) 4

Treaty of Guadalupe Hildago, 9 Stat. 922 (1848). 15

Treaty of Amity, Commerce, and Navigation Between the United States of America and the United States of Mexico, 8 Stat. 410 (1831). 15

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico in this case is reproduced in full in Appendix C, infra.

JURISDICTION

Astrid Galindo Sardoz and Maria Soto Vda. de Talamantes appeal from the decision of the Supreme Court of the State of New Mexico, denying plaintiffs recovery under the state's wrongful death statute.

The decision appealed from was issued on January 14, 1983. The Notice of Appeal was filed in both the Supreme Court of New Mexico and the New Mexico Court of Appeals (the court possessed of the record) on April 8, 1983.

The federal constitutional questions raised herein were presented to the New Mexico Supreme Court and rejected by that Court. See n.1, infra. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

Title 28 U.S.C. § 2403(b) may be applicable in this case; as a result service is being made on the Attorney General of the State of New Mexico.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The fourteenth amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2 provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The "immigration clause" of the United States Constitution, U.S. Const. art. I, § 8, cl. 4 provides in pertinent part: "The Congress shall have Power ... To establish a uniform Rule of Naturalization...."

The relevant portions of the New Mexico Workmen's Compensation Act N.M. Stat. Ann. §§ 52-1-8, 52-1-9, and 52-1-52 are set forth in Appendix E, infra.

The relevant portions of the New Mexico wrongful death statute N.M. Stat. Ann. §§ 41-2-1 and 41-2-3 are set forth in Appendix F, infra.

STATEMENT OF THE CASE

At issue in this case is the New Mexico Supreme Court's construction of the exclusive remedy provision of the state's Workmen's Compensation Act. The New Mexico high court has deprived Mrs. Talamantes, as representative of her husband's estate, of any claim for the negligent death of Bernardo Talamantes. Through the Act's alien exclusion clause, barring death benefits to non-resident aliens, and the state courts construction of the Act's "exclusive remedy" clause, barring

all other common law remedies, Mrs. Talamantes and her children have been stripped of the right to any remedy or compensation whatsoever for the negligent death of their husband and father.

On November 25, 1977 Bernardo Talamantes, a Mexican national residing in New Mexico, was killed while working for the Kent Nowlin Construction Company in New Mexico. Mrs. Talamantes and her children are and were then Mexican citizens residing in the state of Chihauhua. Mrs. Talamantes as personal representative of the estate of her husband brought a wrongful death action under N.M. Stat. Ann. §§ 41-2-1 - 41-2-3 (1978) against Kent Nowlin Construction Company in the District Court for Bernalillo County, New Mexico. After trial, a jury found that the construction company was liable for the negligent electrocution of Mr. Talamantes and awarded $175,000 in damages for his wrongful death.

On September 30, 1982, the New Mexico Court of Appeals upheld the judgment. On certiorari a sharply divided State Supreme Court filed an opinion reversing the trial court and held over a vigorous dissent that summary judgment should have been granted in favor of defendants. This opinion became the final judgment of the Court on January 14, 1983.[1]

In this final judgment the State Supreme Court construed the exclusive remedy provisions of New Mexico's Workmen's Compensation Act (N.M. Stat. Ann. §§ 51-1-8(c) - 51-1-9 (1978))

---

[1]Within one day of issuing its original opinion on May 6, 1982, the State Supreme Court withdrew the opinion sua sponte. On September 30, 1982, the Court subsequently reissued its opinion, with a vigorous dissent attached. The Court then granted plaintiff's request for rehearing. (See Appendix A.) After accepting briefs on the merits which fully argued the federal constitutional questions, the Court issued an order, on January 14, 1983, quashing its grant of rehearing and reinstating the original decision of September 30, 1982. (See Appendix B.) The ruling of January 14, from which this appeal follows, was a denial of the application for rehearing, an entry of the New Mexico Supreme Court's final judgment, and a rejection of appellants' constitutional claims.

to prohibit Mr. Talamantes' "dependents residing outside the United States at the time of the worker's injury ... from pursuing..." a wrongful death action. 22 N.M. Bar Bull. 351, at 353 (1983).

This construction of the exclusive remedy provision when considered in tandem with Section 52-1-52 of the Act absolutely bars the Talamantes family from any claim for the wrongful death of Bernardo Talamantes. Section 52-1-52 denies recovery otherwise available under the Act to a worker's alien relatives or dependents if they are residing outside the United States at the time of the worker's injury. The decision in this case followed hard upon an earlier State Supreme Court ruling upholding Section 52-1-52 against constitutional challenge in Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980).[2]

By the joint operation of the majority opinion's interpretation of the exclusive remedy provision and the alien exclusion clause of § 52-1-52, Mrs. Talamantes is caught up in a classic "Catch 22."[3] Under the decision of the State

---

[2]Pedrazza likewise was a Mexican national. As in this case, his surviving dependents resided in Mexico at the time of his death. 94 N.M. at 61, 607 P.2d at 599. In Pedrazza the State Supreme Court, while cutting off workmen's compensation relief to non-resident aliens, nevertheless indicated that other remedies and compensation were available:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Pedrazza v. Sid Fleming Contractor, Inc., supra at 63, 607 P.2d at 601. In one sentence, the Court in Gutierrez v. Kent Nowlin Construction Co., 22 N.M. S. Bar Bull. 351 (1983), simply dismissed the above statement as dicta and thus disregarded it. Id. at 353.

[3]After the death of her husband, Mrs. Talamantes originally filed a claim under the New Mexico Workmen's Compensation Act. While that claim was pending, she participated as amicus curiae in the State Supreme Court's decision in Pedrazza. When that decision made clear her exclusion from workmen's compensation benefits, but directed

Supreme Court in this case, and despite the fact that the Kent Nowlin Construction Company negligently caused her husband's death, Mrs. Talamantes cannot bring a wrongful death action because her exclusive remedy lies in the Workmen's Compensation Act. Regrettably, however, she has no remedy under the Workmen's Compensation Act, because she and her children are non-resident alien dependents and thus precluded from recovery under § 52-1-52, as upheld in Pedrazza.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The opinion of the New Mexico Supreme Court construes the "exclusive remedy" provision of the Workmen's Compensation Act to bar appellants from pursuing their wrongful death action. The necessary effect of this opinion, read together with the Pedrazza opinion, is to deprive non-resident alien dependents of any remedy or compensation whatsoever for the employment related deaths of their husbands, fathers and providers. This construction of the "exclusive remedy" provision and the compensation act will have a wide- spread and undesirable effect on alien workers and violates the United States Constitution in three distinct ways.

First, it deprives foreign nationals of due process by absolutely and arbitrarily denying any claim, remedy or compensation for a work-related negligent death. Second, the challenged construction contravenes the equal protection clause of the fourteenth amendment because it plainly disadvantages a class without furthering a sufficient state interest. While resident dependents are compensated for the work-related death of their breadwinner, and while alien non-resident dependents of those negligently killed while not on the job can pursue a cause of action, non-resident alien survivors are denied any benefits for work-related deaths.

---

her to other avenues of recovery, Mrs. Talamantes filed the wrongful death action which has led to this appeal.

Third, the opinion's construction violates the supremacy clause, U.S. Const. art. VI, cl. 2 because it interprets New Mexico law in a manner which is inconsistent with the solemn treaty obligations between the United States and Mexico, and because it trenches upon the exclusive and plenary powers of Congress to regulate immigration and foreign affairs. U.S. Const. art. I, § 8, cl. 4.

POINT I

IF THE OPINION OF THE STATE SUPREME COURT IN THIS CASE IS ALLOWED TO STAND IT WILL HAVE WIDESPREAD AND PERNICIOUS CONSEQUENCES.

The consequences of the New Mexico Supreme Court's reading of the exclusive remedy provision in this case are widespread. Workers and their non-resident alien dependents will be left without recourse, while employers such as the Kent Nowlin Construction Company will be freed from any obligation to compensate for negligent conduct and indeed will have no deterrence to their negligence.

There are large numbers of workers from Mexico and other countries in New Mexico. Many of them work in construction and other fields where injury and death are not uncommon. Most of them have dependents residing outside the United States.[4] Moreover, four other states have alien-exclusion provisions substantially similar to New Mexico's in their Workmen's Compensation Acts.[5] In another four states, non-resident aliens receive only a percentage of the full death

---

[4]Stelzner, Precis of Wayne Cornelius's "Mexican Migration to the United States -- Causes, Consequences, and United States Responses," in The Problems of the Undocumented Worker 15 (GPO 1981).

[5]Ala. Code § 25-5-52, -53 (Cum. Supp. 1981) (complete bar against non-resident aliens); Fla. Stat. Ann. § 440.16(7) (Cum. Supp. 1981) ($1,000 ceiling on benefits to non-resident aliens); Ga. Code Ann. § 114-413(e) (Cum. Supp. 1982) ($1,000 ceiling); and Kan. Stat. Ann. § 44-510(b)(i) (Supp. 1980) ($750 ceiling).

benefits otherwise accruing to residents.[6] If the decision of the State Supreme Court below stands, it will send a clear message to each of those states that non-resident alien dependents can be totally deprived of relief or compensation for the death of their breadwinners.

POINT II

AS CONSTRUED BY THE SUPREME COURT OF NEW MEXICO, THE EXCLUSIVE REMEDY PROVISION VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

This case does not fit neatly within the ambit of any of this court's due process clause cases. Nevertheless, it shares the essential characteristics of two related lines of cases, and results in a deprivation more absolute and egregious than found in either.

In the first line of cases this Court has found that a statutory cause of action is a species of property, the deprivation of which receives the full protection of the due process clause of the fourteenth amendment. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); see also Martinez v. California, 444 U.S. 277 (1980). In the second line of cases this Court had held that a denial of due process arises from certain limitations upon a party's access to the courts. Boddie v. Connecticut, 401 U.S. 371 (1971); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

In Logan this Court recently held that a procedural limitation on a claimants ability to assert his statutorily created employment discrimination claim deprived him of a

---

[6] Ariz Rev. Stat. Ann. § 23-1046(c) (1982) (60%); Del. Code Ann. tit. 19, § 2333 (Rev. Pam. 1974) (50%); Ill. Rev. Stat. ch. 48, § 138.7(1) (Cum. Supp. 1982) (50%); Utah Code Ann. § 35-1-72 (Repl. Pamp. 1974) (50%). This Court recently failed to note probable jurisdiction in Jalifi v. Arizona Industrial Commission, 51 U.S.L.W. 3286 (1982) (Justice White would have noted probable jurisdiction). Jalifi upheld Arizona's 60% recovery provision over due process and equal protection challenges. Az. Ct. Appl, Div 1, 3/11/82. Mrs. Talamantes' appeal involves much more substantial questions, because of the total deprivation involved here and because of the supremacy clause violations not presented in Jalifi.

property interest in that cause of action without due process. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437 (1982). The Court in Logan concluded that while a legislature may choose not to create or recognize a particular cause of action once it has created a cause of action, it may not constitutionally deprive anyone of their property interest in that claim without appropriate procedural safeguards. See Logan, 455 U.S. at 432; Vitek v. Jones, 445 U.S. 480, 490-91, n.6 (1980); Arnett v. Kennedy, 416 U.S. 134, 167 (1974). This Court found that Logan was entitled to a hearing on the merits of his claim before it could be dismissed. Logan at 434.

In Boddie this Court employed the slightly different but analogous theory that at least where interests of basic importance are involved and the State has exclusive control over the adjustments of claims through the judicial process, "absent a countervailing state interest of overriding significance" persons must be given "a meaningful opportunity to be heard," Logan, 422 U.S. at 430, n.5, quoting Boddie, 401 U.S. at 377, 379.

As this Court recognized in Logan, these two lines of analysis are closely related. 422 U.S. at 430, n.5. Under Boddie, access to the courts must be "meaningful" and not a mere charade. At the same time Logan requires that "having made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." Logan, 422 U.S. at 430, n.5.

These two theories of due process converge in this case, which involves a denial of access as well as a deprivation of a cause of action. An alien dependent like Mrs. Talamantes may recover under New Mexico's wrongful death statute. Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 150 (1938); Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 588 P.2d 620 (1976). Thus, she has a property

interest in her statutorily created cause of action for the wrongful death of her husband. She has been absolutely deprived of that property interest without any hearing whatsoever on the merits of her claim.

Furthermore, the statutory construction challenged here violates the clear mandate of Boddie v. Connecticut which involved another type of exclusive remedy -- the state's exclusive control over divorce proceedings. Just as petitioners in Boddie were subject to a state monopoly on marriage dissolution, Mr. Talamantes was subject to a compulsory and exclusive employment injury scheme. Boddie dictates that after imposing such a scheme the state may not then deny meaningful access to the courts; any such denial violates due process. While in the narrowest sense the personal representatives of Mr. Talamantes may have access to the courts, they surely do not have the "meaningful access" mandated in Boddie. As interpreted by the majority opinion below, the exclusive remedy provision of the New Mexico compensation act is a charade. It provides no remedy whatsoever.

In this case, then, the State of New Mexico makes access to the courts an entitlement and a necessity. Despite this, the majority opinion's construction of the exclusive remedy provision of the Workmen's Compensation Act totally deprives Mrs. Talamantes of effective access to the courts in order to press her claim. However, the balance of state and private interests do not favor this construction. Indeed, it is wholly arbitrary and irrational.

Under the state court's construction of its Workmen's Compensation Act, whether an alien dependent may be compensated in New Mexico for the death of a worker seems almost a matter of serendipity. If her husband had not been on the job when he was negligently killed, Mrs. Talamantes could recover under New Mexico's Wrongful Death Act (N.M. Stat. Ann. §§ 41-2-1 to 41-2-3 (1978)) even if she were a non-resident alien

dependent. See, e.g., Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). Furthermore, if Mrs. Talamantes and her children were resident aliens they could, of course, recover death benefits under the Workmen's Compensation Act. N.M. Stat. Ann. §§ 52-1-1 to 52-1-69 (1978). Thus, following the New Mexico Supreme Court's rationale, it is only because of the confluence of two factors in this case -- non-resident alienage of the dependents, and the employment-related death -- that Mrs. Talamantes is completely deprived of any cause of action.

The only rationale articulated by the court below was that its construction of the exclusive remedy provision reflects a "balance between the worker's need for expeditious payment and the employer's need to limit liability." 22 N.M. S. Bar Bull. at 352. However that balance is thoroughly upset when, as in this case, the worker and his dependents receive no relief at all from their exclusive remedy, while the employer incurs no liability whatsoever.

Nor can it even be seriously suggested that there are substantial administrative difficulties involved in determining the appropriate compensation for non-resident aliens. Since 1938 non-resident alien dependents have been recognized as proper recipients of benefits under New Mexico's Wrongful Death Act. Trujillo v. Prince, 42 N.M. 337, 345, 78 P.2d 145, 150 (1938); Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). Presumably, administrative difficulties have been overcome or been proven fanciful.[7]

Most important, it is certain that depriving Mrs. Talamantes of any relief at all, and providing the Kent Nowlin

---

[7]Moreover, Mexican counsul officers can facilitate matters through their power to represent non-resident Mexican nationals and to receive benefits on their behalf. See n.13, infra.

Construction Company with a windfall despite its negligence, subverts the purposes of both New Mexico's Wrongful Death Act and its Workmen's Compensation scheme. These provisions were drawn to insure humanitarian and economic compensation for their beneficiaries, as well as to deter negligent conduct. See e.g., Anaya v. N.M. Steel Erectors Inc., 94 N.M. 370, 610 P.2d 1190 (1980); Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145, 150 (1938).[8] Both of these purposes are utterly undermined by the necessary impact of the majority opinion's construction of the "exclusive remedy" provision.

In sum, no legitimate state interest is served by the majority opinion's construction of the "exclusive remedy" clause of the compensation act. On the contrary, plaintiffs and other alien dependents are totally deprived of remedy or compensation while employers are relieved of the consequences of their negligence.

POINT III

THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION OF THE WORKMEN'S COMPENSATION ACT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

It is well established that a state statutory scheme which discriminates invidiously on the basis of alienage violates the equal protection clause of the fourteenth amendment. See e.g. Plyler v. Doe, ___ U.S. ___, 102 S. Ct. 2382 (1982); Graham v. Richardson, 403 U.S. 365 (1971). Quite apart from

---

[8]This Court has observed that where the state is merely defining the elements of a statutorily-created cause of action its "interest in fashioning its own rules of tort law is paramount to any federal interest except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." Martinez v. California, 444 U.S. 277, 282 (1980). In this case, the majority opinion did not merely define an element of a workmen's compensation claim. Rather, coupled with Pedrazza, it created an absolute bar to recovery by a particular class -- non-resident alien dependents.

In any event, as discussed infra, the state court's interpretation of the "exclusive remedy" provision is "wholly arbitrary and irrational."

alienage, a statutory classification which serves no rational state purpose violates the equal protection clause.

A. Mr. Talamantes' Equal Protection Interests Are Implicated By This Construction of the Exclusive Remedy Provision.

Appellants' interests under New Mexico's wrongful death statute derive from the interests of the decedent. New Mexico's wrongful death statute is a "survival-type" statute. See, e.g. Stang v. Hertz, 81 N.M. 348, 467 P.2d 14 (1970); Natseway v. Jojola, 56 N.M. 793, 800, 251 P.2d 274, 278 (1952). This type of statute preserves the decedent's own cause of action rather than creating an independent cause of action in the survivors for their injuries. See W. Prosser, The Law of Torts § 902 (4th ed. 1971). Therefore, the Court's construction of the "exclusive remedy" provision of the compensation act implicates not only independent interests of the non-resident alien dependents, but also implicates interests of the resident alien worker, Mr. Talamantes, who can claim the benefits of the equal protection clause.

In addition, whatever the nature of New Mexico's wrongful death statute, under this Court's decisions Mr. Talamantes has been deprived of rights as a result of the New Mexico court's construction. In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) the plaintiffs challenged a section of the Social Security Act which provided benefits for widowed mothers, but not for fathers whose wives had died. Despite the fact that the claimed benefits would have been paid to the husband, this Court concluded that the wife's rights were implicated because the section operated "to deprive women of protection for their families...." 420 U.S. at 645. Likewise, the invidious discrimination in the present case operates to deprive Mr. Talamantes of protection for his family, and thus implicates his rights under the equal protection clause.

B. Because It Creates a Classification Based on Alienage, The Court's Construction Violates the Equal Protection Clause.

The effect of the court's opinion in this case is to create two legal regimes to deal with compensation of workers who die in work-related accidents. For one set of workers and their dependents the law provides a remedy and compensation. For the others, like Mr. Talamantes, there is neither remedy nor compensation. The distinction between the two groups is based solely on alienage.[9]

Classifications based on alienage are subject to the strictest scrutiny, Graham v. Richardson, 403 U.S. 365, 372 (1971); Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (Blackmun J., concurring at 2987); or at a minimum require some special solicitude requiring justification by "some substantial goal of the state." Plyler v. Doe, 102 S. Ct. 2382 (1982). See also United States v. Carolene Products, 304 U.S. 144, 152-53 n.4 (1945).

There are no "substantial goals" of the State of New Mexico which can justify the discrimination wrought by the court's construction of the workers' compensation act, which deprives non-resident aliens of any remedy or compensation whatsoever for the negligent death of their husband, father, and breadwinner. Certainly an interest in preserving the financial resources of the employer is constitutionally unavailing. In Plyler, this Court expressly rejected Texas' proffered justification that protecting even the public fisc warranted the discrimination. 102 S. Ct. at 2400. See also Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (1982), (Blackmun J., concurring). Moreover, any justification based on a state's interest in discouraging illegal immigration was also rejected in Plyler, 102 S. Ct. at 2398-2400, and would be

---

[9]While section 52-1-52 appears neutral on its face, the New Mexico Supreme Court in Pedrazza candidly identified the bar to survivors' benefits as "hostile" legislation, 92 N.M. at 62, 607 P.2d at 600. See also Gallup America Coal Co. v. Lira, 39 N.M. 496, 501, 50 P.2d 430, 435 (1935).

similarly inappropriate in this case.[10] Plyler compels the conclusion that the workmen's compensation act, as construed below, violates the equal protection clause.

C. The Classification Created by the Court Below Is Arbitrary and Irrational and Fails Even Under the "Rational Basis" Test.

A classification which serves no rational state purpose must fail. Royster Guano v. Virginia, 253 U.S. 412 (1920) As discussed above in Points II & III (B), supra, there is no seriously articulable rational for the classification scheme created by the challenged construction of the exclusive remedy provision. Indeed no legitimate goal of the state is imaginable which could justify the harshness, hostility and discrimination against aliens evinced by depriving appellants of all remedy and compensation for the negligent death of Mr. Talamantes. Therefore, at any level of scrutiny, the court's construction of the compensation act violates the equal protection clause of the fourteenth amendment.

POINT IV

THE STATE SUPREME COURT'S CONSTRUCTION OF THE EXCLUSIVE REMEDY PROVISION VIOLATES THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Court's Construction Is In Conflict with Controlling Federal Treaties.

In Kolovrat v. Oregon, 366 U.S. 187 (1961), the Court struck down under the supremacy clause a state statute prohibiting non-resident aliens from inheriting property. This Court concluded that the statute conflicted with federal obligations: "[S]tate policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy

---

[10] If anything, this construction of the "exclusive remedy" provision would tend to promote illegal immigration. Alien dependents who physically reside in New Mexico, even illegally, are "residents" of the state. See Perez v. HSSD, 91 N.M. 334, 573 P.2d 689 (Ct. App.), cert. denied, 91 N.M. 491, 576 P.2d 297 (1978). To protect themselves and their families prudent workers are likely to move their families to the United States with or without documents.

Clause to 'overriding' federal treaties and conflicting arrangements ...." 366 U.S. at 190. In reaching its holding, the Court rejected a narrow and technical construction by the state court of a treaty between the United States and Yugoslavia, stating that the treaty must be construed liberally to give effect to the purpose of the treaty to ensure free traffic and commerce among the signatory nations. 366 U.S. at 192-93, 194.

The New Mexico Court's construction of the "exclusive remedy" provision of the workers' compensation statute as barring any compensation and remedy whatsoever to nonresident alien survivors of the worker contravenes solemn treaty obligations between the United States and Mexico. The 1831 Treaty of Amity, Commerce, and Navigation Between the United States of America and the United Mexican States,[11] 8 Stat. 410, was incorporated by reference into the Treaty of Guadalupe Hidalgo, 9 Stat. 922, art. XVII (1848). Article XIV of the 1831 Treaty clearly establishes that Mexican nationals are to have "special protection to [their] persons and property" in the United States. The same article goes on to provide that this "special protection" shall be executed by providing to Mexican nationals "open and free" access to the courts, on equal terms as are afforded to citizens of the United States. The article finally provides:[12]

> [T]he citizens of either party, or their agents, shall enjoy, in every respect, the same rights and privileges, either in prosecuting or defending their

---

[11] This treaty must be construed liberally to give effect to its stated purpose to establish "most favored nation status" to the signatories, art. III, and to promote free and secure commerce and intercourse between the citizens of the two countries. Art. IV.

[12] It should be noted that while all the other clauses of article XIV of the treaty limit the rights conferred therein to Mexicans within the territorial confines of the United States, this last clause has no such limitation and applies, by its terms, to all Mexican citizens, whether resident or non-resident in the United States.

rights of person or of property, as the citizens of the country where the cause may be tried.

The court's construction of the "exclusive remedy" provision and the workers' compensation act conflicts with the explicit and implicit requirements of the 1831 treaty in several ways. First, in construing the statute to completely insulate a negligent employer who causes the death of a Mexican national working in the United States, it can hardly be said that "special protection to the person" of the Mexican national is being afforded. Moreover, in denying to the survivors of the decedent any right to compensation whatsoever, either through survivors' benefits or wrongful death action, the court construes the compensation act in such a way as to specifically deny to Mexican nationals the same "rights and privileges, either in prosecuting or defending their rights of person or of property,"[13] as United States citizens are afforded. The "exclusive remedy" provision of the workers' compensation statute, as construed by the majority opinion, is in conflict with controlling federal treaties and therefore is violative of the supremacy clause.

B. The Court's Construction Interferes with the Federal Government's Exclusive and Plenary Control Over Immigration Policy.

Even if the court's construction of the "exclusive remedy" provision did not conflict with specific treaty

---

[13]Moreover, article IX, section 2, of the Convention between the United States and Mexico respecting the duties of consular officers specifically identifies as one of the duties of the consul to collect and receive "on behalf of his non-resident countrymen ... [benefits] accruing under provisions of so-called Workmen's Compensation Laws or other like statutes." 57 Stat. 800. An analysis of the entire range of treaties and arrangements between the United States and Mexico establishes that it is the intention of the signatory countries that non-resident Mexican nationals would not be deprived of all remedies or compensation for the death of a Mexican worker in the United States, as the New Mexico Court holds. Rather, these solemn treaty obligations clearly contemplate that non-resident Mexican survivors would be entitled to compensation and would have the ability to pursue their right to compensation through judicial remedy.

obligations, it would still violate the supremacy clause because the statute, as construed, interferes with the federal government's exclusive and plenary control over immigration policy. The Constitution of the United States of America vests exclusive and plenary authority in the federal government to regulate immigration into the United States. U.S. Const. art. I, § 8, cl. 4; see Toll v. Moreno, ___ U.S. ___, 102 S. Ct. 2977 (1982). The United States Supreme Court and lower federal courts have held consistently that where a state statutory scheme imposes discriminatory burdens upon the entrance or residence of aliens, such a scheme encroaches on the federal government's power to regulate immigration and therefore is preempted under the supremacy clause. See e.g., Toll v. Moreno, at 2982; Graham v. Richardson, 403 U.S. 365 (1971).

In Toll v. Moreno, this Court held that a University of Maryland policy which precluded non-immigrant aliens from consideration as in-state students for tuition purposes imposed a discriminatory burden on the aliens in violation of the supremacy clause. Similarly, in Graham v. Richardson this Court struck down an Arizona regulatory scheme which imposed discriminatory treatment on aliens by requiring a five-year residency period for alien eligibility for welfare benefits, where no such durational eligibility requirement existed for United States citizens. The Court held that this discriminatory treatment trenched on Congress' exclusive power to regulate immigration and therefore violated the supremacy clause. "State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government." 403 U.S. at 378.

The court's construction of the "exclusive remedy" provision of the compensation act creates just the type of state-imposed discriminatory burden invalidated in Toll and Graham. Like the regulatory schemes in those cases, the construction

of the "exclusive remedy" provision is discriminatory. While resident survivors are afforded some benefits and remedies for the death of the decedent, non-resident aliens are denied all benefits and remedies. Like Toll and Graham, the discriminatory treatment is based on alienage.[14] Finally, like the schemes in those cases, the deprivation of any compensation or remedy to alien workers and their survivors imposes a burden on the immigration of alien workers to New Mexico. The total and discriminatory deprivation of all compensation and remedy to non-resident alien survivors is violative of the supremacy clause.

CONCLUSION

Because of the substantiality of the constitutional questions presented, appellants respectfully request that the Court note probable jurisdiction and set this case for plenary consideration, including briefs on the merits and oral argument in support thereof.

Respectfully submitted,

LUIS G. STELZNER
MICHAEL B. BROWDE
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5326

WILLIAM H. CARPENTER
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

TIMOTHY SHEEHAN
PO Box 271
Albuquerque, NM 87103
(505) 247-0411

OF COUNSEL

JOAQUIN G. AVILA
MORRIS J. BALLER
JOHN E. HUERTA
Mexican American Legal Defense and Education Fund
28 Geary Street
San Francisco, CA 91204
Counsel for Appellants

---

[14] See n.9, supra.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, October 15, 1982

NO. 13,914

KENT NOWLIN CONSTRUCTION COMPANY,

Petitioner,

vs. Original Proceeding on Certiorari

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES,

Respondents.

This matter coming on for consideration by the Court upon Motion of Respondents for a rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Respondents for rehearing is hereby granted.

IT IS FURTHER ORDERED that Respondents shall file a brief addressing the issues contained in the motion for rehearing on or before ten (10) days from the date hereof and Petitioner shall have ten days from the date of filing of Respondents' brief to file their responsive brief.

ATTEST: A True Copy

ROSE MARIE ALDERETE
CLERK OF THE SUPREME COURT

By _____ Deputy

OCT 22 1982

APPENDIX B

AMENDED ORDER

NO. 13,914

KENT NOWLIN CONSTRUCTION COMPANY,

Petitioner,

vs. Original Proceeding on Certiorari

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, as co-personal representatives of the Estate of Bernardo Talamantes a/k/a Hector M. Baylon, Deceased,

Respondents.

WHEREAS, it appearing to the Court that an Order was entered by this Court on October 13, 1982, granting Motion for Rehearing in the above cause, and it now appearing to the Court, upon reconsideration of the motion for rehearing, that the Order entered by the Court on October 13, 1982 should be vacated and set aside, Mr. Justice Federici, Mr. Justice Riordan and Mr. Justice Stowers concurring, Mr. Senior Justice Sosa dissenting, Mr. Chief Justice Payne dissenting without opinion;

NOW, THREFORE, IT IS ORDERED that the Order entered by the Court on October 13, 1982, granting the motion for rehearing is hereby vacated and set aside.

IT IS FURTHER ORDERED that the Opinion of the Court of Appeals in Cause No. 4931, together with the dissent, be published in the New Mexico Reports.

SUPREME COURT OF NEW MEXICO
FILED
JAN 14 1983

ATTEST: A TRUE COPY

Rose Marie Aldrete

Clerk of the Supreme Court
of the State of New Mexico

Rose Marie Aldrete

JAN 20 1983

APPENDIX C

Bulletin

ADVANCE OPINIONS OF
THE SUPREME COURT &
THE COURT OF APPEALS

From the New Mexico Supreme Court

KENT NOWLIN CONSTRUCTION COMPANY
Petitioner,

versus

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES,
as co-personal representatives of the Estate of Bernardo Talamantes,
a/k/a Hector M. Baylon, Deceased,
Respondents.

No. 13914 (filed September 30, 1982)

ORIGINAL PROCEEDING ON CERTIORARI

ZACHARY L. McCORMICK
MODRALL, SPERLING, ROEHL, HARRIS & SISK
Albuquerque, New Mexico
Attorney for Petitioner

TIMOTHY M. SHEEHAN
Albuquerque, New Mexico

WILLIAM H. CARPENTER
Albuquerque, New Mexico
Attorney for Respondents

OPINION

MACK EASLEY, Chief Justice

Estela Gutierrez and Maria Sota Vda De Talamantes, as co-personal representatives of the Estate of Bernardo Talamantes (Talamantes), brought a wrongful death action against Kent Nowlin Construction Company. The matter was heard before a jury, which returned a verdict in favor of the Talamantes' Estate for $175,000. The Court of Appeals affirmed the trial court, and we reverse the Court of Appeals.

The dispositive issue raised on certiorari is: Whether the New Mexico Workmen's Compensation Act, Sections 52-1-1 through 52-1-69, N.M.S.A. 1978 (Orig. Pamp. & Cum. Supp. 1981), is an exclusive remedy, thereby precluding a wrongful death action brought by relatives or dependents not residents of the United States at the time of the deceased's injury.

Talamantes died in the course of and in the scope of his employment with Nowlin. Nowlin's workmen's compensation carrier paid all medical bills and funeral expenses but would not pay benefits to his dependents or relatives because they were residents of the Republic of Mexico at the time of Talamantes' death.

Nowlin argues that the Workmen's Compensation Act is an exclusive remedy and therefore recovery is limited to the Act. Sections 52-1-8 and 52-1-9,

N.M.S.A. 1978. Since the Act specifically denies recovery for the worker's dependents or relatives residing outside of the United States at the time of injury, Section 52-1-52, N.M.S.A. 1978, the personal representatives of the estate are entitled to nothing. The wrongful death action was therefore improper, and the motion for summary judgment in the guise of a motion for failure to state a claim should have been granted.

Gutierrez, on the other hand, relies on our opinion Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980). The decedent in Pedrazza was a Mexican national employed in New Mexico, and he was killed in the course of his employment. His surviving dependents were all non-resident aliens and challenged Section 52-1-52 as unconstitutional. That provision reads:

> Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act, shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman. [Emphasis added.]

We upheld the constitutionality of this provision and the bar to benefits under the Act. We went on to say:

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Pedrazza v. Sid Fleming Contractor, Inc., supra at 63, 607 P.2d at 601. The Court of Appeals relied on our language and affirmed the decision of the trial court.

We begin by analyzing the intent and purpose behind the Act. Before the advent of workmen's compensation acts, employees had little hope in recovering monetary judgments under common law torts. W. Prosser, Law of Torts Section 80 (4th ed. 1971). Approximately seventy to ninety-four percent of all labor casualties received no compensation under the common law. 1 E. Blair, Reference Guide to Workmen's Compensation Law 1-1 (1968). To ameliorate this hardship, our Legislature passed the Workmen's Compensation Act. Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P.2d 903 (1924). The exclusive remedy provisions are a balance between the worker's need for expeditious payment and the employer's need to limit liability. See Roseberry v. Phillips Petroleum Company, 70 N.M. 19, 369 P.2d 403 (1962); Prosser, supra.

With this background, we are asked to interpret whether Section 52-1-52, which denies recovery under the Act to worker's relatives or dependants living outside the United States, falls within the exclusive remedy provisions of the Act. The pertinent parts of the exclusive remedy provisions state:

> Any employer who has complied with the provisions of the Workmen's Compensation Act . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act. [Emphasis added.]

Section 51-1-8(C), N.M.S.A. 1978.

> The right to the compensation provided for in this act [is] in lieu of any other liability whatsoever to any and all persons whomsoever, for . . . death resulting therefrom. . . . [Emphasis added.]

Section 52-1-9, N.M.S.A. 1978.

"When the words of the statute are

clear and unambiguous, we are bound by their plain meaning." Federal Land Bank of Wichita v. Burgett, ___ N.M. ___, 641 P.2d 1066 (1982). The plain meaning of these provisions is that the Act is an exclusive remedy, unless otherwise provided for in the Act. The Act does not make an exception, and we will not create one. Our language in Pedrazza was dicta. Dictum is unnecessary to the holding of a case and therefore is not binding as a rule of law. Rocky Mountain Life Insurance Company v. Reidy, 69 N.M. 36, 363 P.2d 1031 (1961). We hold that resident dependents residing outside the United States at the time of the worker's injury are barred from pursuing their common law remedies due to the exclusive remedy provisions under the Act. To hold otherwise would subject employers to unlimited liability and defeat the underlying principles of the Act.

Since we have held that the motion for summary judgment should have been granted, we do not reach the other issues raised on certiorari.

IT IS SO ORDERED.

s/MACK EASLEY, Chief Justice

WE CONCUR:
s/WILLIAM R. FEDERICI, Justice
s/WILLIAM RIORDAN, Justice

DAN SOSA, Senior Justice dissents.
H. VERN PAYNE, Justice, respectfully dissents without opinion.

DISSENTING OPINION

I cannot concur with the majority opinion. The fundamental flaw with the majority's position is that they have applied the Workmen's Compensation Act to a party who has been expressly excluded by the Legislature from its operation.

This case was submitted to a jury on the issue of wrongful death. The jury was instructed that an illegal alien in the United States is entitled to sue in our courts, under our laws, the same as a citizen. (f.n. 1) The jury returned a verdict for the plaintiffs-respondents in the amount of $175,000.00. In order to have returned this verdict, the jury necessarily

concluded that Kent Nowlin Construction Company (f.n. 2) negligently took the life of Mr. Talamantes. (f.n. 3)

Yet, in an attempt to insulate themselves from liability, the employer herein argues that since the deceased was a worker, any cause of action for his death must be filed under the Workmen's Compensation Act, and his dependents, as nonresident aliens, are not entitled to damages. The majority was persuaded by this specious contention; I am not.

The dispositive issue on appeal is not as phrased by the majority, but rather is whether a nonresident alien dependent is covered by the Workmen's Compensation Act so that the exclusivity provision of the Act, Section 52-1-9, N.M.S.A. 1978, would preclude his estate from bringing a wrongful death action. The answer is clearly in the negative.

The majority, however, disagrees. In deciding that nonresident aliens have no remedy whatsoever when a member of their family is killed through the negligence of a United States citizen employer, the majority dismisses our rationale in Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980), as mere dicta. (f.n. 4) In particular, the majority classifies the following language as unnecessary to the holding in Pedrazza.

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Id. at 63, 607 P.2d at 601.

I disagree that this language is dicta. Had this Court concluded in Pedrazza that the dependents' claims to compensation were derivative of the worker, a different conclusion may have been reached. In addition, had this Court concluded that the Workmen's Compensation Act was the exclusive remedy and that a nonresident alien has no cause of action in the United States for the death of a family member during the course of his employment, then a

different conclusion may have been reached. However, the above-quoted paragraph was essential to this Court's holding that the denial of recovery under the Act did not violate the equal protection clause of our constitutions.

In addition, the above-quoted statement is legally correct under prevailing statutory construction principles. Statutory construction principles must be applied by a court with the ultimate purpose of ascertaining and giving effect to the manifest intent of the Legislature in enacting the statute under scrutiny. See Section 12-2-2, N.M.S.A. 1978. We must give a statute its literal reading if the words used are plain and unambiguous, provided such a construction would not lead to an injustice, absurdity or contradiction. State v. Nance, 77 N.M. 39, 419 P.2d 242 (1966), cert. denied, 386 U.S. 1039 (1967).

The exclusivity provision of the Workmen's Compensation Act provides:

> The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], [is] in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury . . . or death . . . . [Emphasis added.]

Section 52-1-9.

As this Court held in Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978), the above-quoted provision means that:

> Once a workmen's compensation act has become applicable either through compulsion or election, it affords the exclusive remedy for the injury by the employee or his dependents against the employer and insurance carrier. This is part of the quid pro quo in which the sacrifices and gains of employees and employers are to some extent put in balance, for, while the employer assumes a new liability without fault, he is relieved of the prospect of large damage verdicts. [Emphasis added.]

Id. at 791, 581 P.2d at 1286 (quoting 2A A. Larson, Workmen's Compensation Law Section 65.10 (1976)). We are bound by this particular ruling in Mountain States, supra. Gallos Chevrolet Co. v. Chaney, 92 N.M. 618, 593 P.2d 59 (1979).

Thus, the preliminary issue we must address is whether the respondents in this case have a right to compensation under the Workmen's Compensation Act. The answer is clearly no. Section 52-1-52 provides in pertinent part:

> No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependants not residents of the United States at the time of the injury of such workman. [Emphasis added.]

It is undisputed that the respondents in this case are nonresident alien dependents. The clear and unambiguous meaning of the above-quoted provision is that a nonresident alien dependent has no right to compensation under the Workmen's Compensation Act. The exclusivity provision of the Act provides that only those who are entitled to compensation under the Act take in lieu of any other liability. Since the respondents in this case are not entitled to compensation under the Act, they do not take in lieu of any other liability provisions (e.g., a wrongful death action). Nowhere in the Act has the Legislature specifically denied nonresident aliens other statutory or common law remedies when a citizen employer negligently takes the life of their family member.

Section 52-1-8, N.M.S.A. 1978, does not assist the majority in reaching their conclusion. In Pedrazza, supra, we held that a dependent's recovery under the Act was separate and distinct from the recovery afforded an employee. Therefore, the status of the dependents would determine whether they could recover under the Act. The respondents here are nonresident aliens, and, as such, they may not recover under the Act. Section 52-1-52.

Section 52-1-8 provides that all statutory and common law rights are abolished when an employer is in compliance with the Act, unless otherwise provided. Since Section 52-1-52 denies nonresident alien dependents the right to compensation under the Act, they are excluded from the operation of Sections 52-1-8 and 52-1-9 as well.

A nonresident alien dependant simply does not enjoy the benefits of the Act. As we acknowledged in Mountain States, supra, under this Act, an employee is given the benefit of a no fault action in return for the limited liability given the employer. As the majority acknowledges, the Workmen's Compensation Act was enacted as a humanitarian statute to ameliorate the hardship faced by employees when seventy to ninety-four percent of all labor casualties were not compensated. See Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924); 1 E. Blair, Reference Guide To Workmen's Compensation Law 1-1 (1968). Under the legislative scheme, if you are a resident dependent, then you need not prove fault to recover damages for the death of your family member caused during the course of his employment. However, if you are a nonresident, you must prove fault, even though the odds of doing so are weighted heavily against you.

In this case, the nonresident aliens did prove negligence, and they did so in the face of contributory negligence. Insulating an employer from having to pay damages to a nonresident family for negligently taking the life of their "breadwinner" on the basis of a strained statutory analysis is unjust, absurd and contrary to legislative intent. The Legislature did not indicate in the Act that its intention was to deny nonresident aliens any other statutory or common law remedies when an employee may be injured or die while on the job because of the negligence of an employer.

This Court held in Pedrazza, supra, that the plaintiffs in that case did not have a due process right to workmen's compensation benefits. This Court also held that the plaintiffs in Pedrazza were beyond the reach of the equal protection clause. However, under the supremacy clause of the United States Constitution, a federal treaty will control over a state statute that frustrates federal policy. U.S. CONST. art. VI, sec. 2. The United States has treaties with thirteen countries (not including Mexico) under which nonresident alien workers and their dependents are guaranteed the same rights and privileges as American nationals. 2A. Larson, Workmen's Compensation Law Section 63.52 (1981). Although the United States does not have a treaty with Mexico specifically granting such rights to nonresidents, the United States has entered into treaties with Mexico which assume that Mexicans will be given such rights. For example, Article IX, Section 2 of a Convention between the United States of America and Mexico respecting the duties and rights of consular officers authorizes Mexican consuls to accept payments accruing to their countrymen under Workmen's Compensation Laws or like statutes. Convention on Consular Officers, proclaimed June 16, 1943, United States-Mexico, art. IX, sec. 2, 57 Stat. 800.

In any event, the position taken by the majority that, insofar as a nonresident alien is prevented from seeking damages for the death of a family member under any theory, they are covered by the Workmen's Compensation Act, is inconsistent and illogical. I agree that nonresident alien dependents cannot claim compensation under the Act; however, they can pursue other avenues for recovery. The only reason the Legislature provided that nonresident alien dependents could not recover under the Act is because, had they not so specified, the nonresident alien could have recovered under the Act without proving fault on the part of the employer.

The New Mexico Wrongful Death Act, Sections 41-2-1 to 41-2-4, N.M.S.A. 1978 (Repl. Pamp. 1982), was designed to provide a remedy where death is caused by the wrongful action of another and where the wrongdoer would have been liable to the injured party if death had not occurred. See Whitmer v. El Paso & S.W. Co., 201 F. 193 (5th Cir. 1912). The record clearly establishes, and the jury found, that Mr. Talamantes was killed through the negligence of Kent Nowlin Construction Co. Indeed, Kent Nowlin Construction Co. has not even argued to this Court that there is not substantial evidence to warrant support of the jury's decision. Under such facts as these, a wrongful death action would be the appropriate legal remedy for the

personal representatives of the decedent to pursue for the negligent death of their breadwinner. If Mr. Talamantes had lived, he would have had the right to sue for personal injuries. Because he died, that right belongs to his personal representatives. A Mexican national serving as a personal representative may maintain a claim for wrongful death. Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App.), cert. denied, 90 N.M. 8, 558 P.2d 620 (1976). This was done here by Mr. Talamantes' dependants. Clearly, such nonresident alien personal representatives should be allowed to avail themselves of the laws of New Mexico to seek compensation for wrongful death.

The majority opinion serves notice to all the world that people who do not reside in the United States have no cause of action when an employer in the United States negligently takes the life of their family member. The majority apparently believes that the sign in the courtroom in which we hear oral arguments monthly should read: "Dedicated to the administration of equal justice under law, except for nonresident Mexican aliens."

I cannot join in this unjust construction of the Workmen's Compensation Act. I respectfully dissent.

s/DAN SOSA JR., Senior Justice

FOOTNOTES

1. This jury instruction was not challenged and, as such, is binding on the parties. N.M.R. Civ. P. 51(J), N.M.S.A. 1978 (Cum. Supp. 1981).
2. Kent Nowlin, as a corporation, is subject to liability under the Wrongful Death Act. See Section 41-2-1, N.M.S.A. 1978.
3. This case was tried under the doctrine of contributory negligence.
4. Justice Payne authored the opinion in Pedrazza, in which Justices Easley and Felter concurred and Justice Federici dissented. I did not participate.

APPENDIX D

IN THE SUPREME COURT

OF THE STATE OF NEW MEXICO

ESTELA E. GUTIERREZ and
MARIA SOTA VDA DE TALAMANTES
as co-personal representatives
of the Estate of BERNARDO
TALAMANTES a/k/a HECTOR M.
BAYLON, deceased,

Plaintiffs,

vs.

KENT NOWLIN CONSTRUCTION
COMPANY,

Defendant.

filed
4-8-83

No. CV-78-3123

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES, plaintiffs in the above-captioned cause, hereby appeal to the Supreme Court of the United States from the denail of rehearing and the resulting final entry of judgment issued by this Court on January 14, 1983.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

LUIS G. STELZNER
MICHAEL B. BROWDE
Attorneys at Law
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5665

WILLIAM H. CARPENTER
Attorney at Law
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

Attorneys for Plaintiffs

I hereby certify that on
the 8th day of April, 1983,
a copy of the foregoing
was mailed to opposing
counsel Zachary L. McCormick,
PO Box 2168, Albuquerque,
New Mexico 87103.

APPENDIX E

New Mexico Workmens' Compensation Act

52-1-8. Defenses to action by employee.

In an action to recover damages for a personal injury sustained by an employee while engaged in the line of his duty as such, or for death resulting from personal injuries so sustained in which recovery is sought upon the ground of want of ordinary care of the employer, or of the officer, agent or servant of the employer, it shall not be a defense:

A. that the employee, either expressly or impliedly, assumed the risk of the hazard complained of as due to the employer's negligence;

B. that the injury or death was caused, in whole or in part, by the want of ordinary care of a fellow servant; and

C. that the injury or death was caused, in whole or in part, by the want of ordinary care of the injured employee where such want of care was not willful.

Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance, or any of the employees of the employer, including management and supervisory employees, shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever, and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

52-1-9. Right to compensation; exclusive.

The right to the compensation provided for in this act [52-1-1 to 52-1-69 NMSA 1978], in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

52-1-52. [Exemption of compensation from claims of creditors, attachment, garnishment or execution; payees; residents of foreign countries barred from receiving payment.]

Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act [52-1-1 to 52-1-69 NMSA 1978], shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman.

APPENDIX F

New Mexico Wrongful Death Statutes

41-2-1. [Death by wrongful act or neglect; liability in damages.]

Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

41-2-3. [Personal representative to bring action; damages; distribution of proceeds of judgment.]

Every such action as mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister or child or children of the deceased child, but shall be distributed as follows:

First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if such deceased be a minor, childless and unmarried, then to the father and mother, who shall have an equal interest in the judgment, or if either of them be dead, then to the survivor; if there be no father, mother, husband, wife, child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

7

SEP 30 1981

82-6614

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

ESTELA E. GUTIERREZ and MARIA SOTA VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES a/k/a HECTOR M. BAYLON, deceased,

Plaintiffs-Appellees,

v. No. 4931

KENT NOWLIN CONSTRUCTION COMPANY,

Defendant-Appellant

COURT OF APPEALS OF NEW MEXICO
FILED
SEP 30 1981

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY

LOVE, Judge

TIMOTHY M. SHEEHAN
Sheehan & Sheehan

and

WILLIAM H. CARPENTER
Albuquerque, New Mexico

Attorneys for Appellees

ZACHARY L. McCORMICK
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
Albuquerque, New Mexico

Attorney for Appellant

O P I N I O N

HERNANDEZ, Chief Judge

This is a wrongful death action. The defendant appeals from a judgment, entered on a jury verdict, in favor of plaintiffs.

The deceased, Bernardo Talamantes, was killed while in the course and scope of his employment with defendant. Defendant's insurance carrier paid all medical bills, and $1,500.00 in funeral expenses. The deceased left surviving him a widow and six minor children, all of whom were residents of the Republic of Mexico on the date of the accidental injury and death.

The defendant alleges six points of error which will be considered in sequence.

POINT I: The New Mexico Workmen's Compensation Act [Sections 52-1-1 to 52-1-69, N.M.S.A. 1978] provided the exclusive remedy against the defendant.

The pertinent sections and subsections of the Act read as follows:

Section 52-1-6 (D):

> Such compliance with the provisions of the Workmen's Compensation Act, including the provisions for insurance, shall be, and construed to be, a surrender by the employer and the employee of their rights to any other method, form or amount of compensation or determination thereof, or to any cause of action at law, suit in equity or statutory or common-law right to remedy or proceeding whatever for or on account of such personal injuries or death of such employee than as provided in the Workmen's Compensation Act, and shall be an acceptance of all of the provisions of the Workmen's Compensation Act, and shall bind the employee himself, and for compensation for his death, shall bind his personal representatives, his surviving spouse and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

Section 52-1-8:

> Any employer who has complied with the provisions of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] relating to insurance . . . shall not be subject to any other liability whatsoever for the death of or personal injury to any employee, except as provided in the Workmen's Compensation Act, and all causes of action, actions at law, suits in equity and proceedings whatever,

and all statutory and common-law rights and remedies for and on account of such death of, or personal injury to, any such employee and accruing to any and all persons whomsoever, are hereby abolished except as provided in the Workmen's Compensation Act.

Section 52-1-9:

The right to the compensation provided for in this act, in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:

A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;

B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and

C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted.

Section 52-1-17:

As used in the Workmen's Compensation Act unless the context otherwise requires, the following persons, and they only, shall be deemed dependents and entitled to compensation under the provisions of the Workmen's Compensation Act:

A. a child under eighteen years of age. . . ;

B. the widow . . . ; . . . only if . . . legally entitled to be supported by him. . . .

Section 52-1-52:

Compensation shall be exempt from claim of creditors and from any attachment, garnishment or execution, and shall be paid only to such workman or his personal representative, or such other persons as the court may, under the terms hereof, appoint to receive or collect the same. No claim or judgment for compensation, under this act shall accrue to or be recovered by relatives or dependents not residents of the United States at the time of the injury of such workman. (Emphasis added.)

Section 41-2-3, N.M.S.A. 1978 of the New Mexico Wrongful Death Act provides:

Every such action as mentioned in Section 41-2-1 NMSA 1978 shall be brought by and in the name or names of the personal representative or

> representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased . . . but shall be distributed as follows: . . . if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; . . . if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

The defendant contends that the Workmen's Compensation Act provides the exclusive remedy against the employer in a case of this nature. Defendant, in support of this contention, cites us to Gallegos v. Chastain, ____N.M._____, ____P.2d____ (Ct. App. 1981) wherein we held that:

> The exclusivity provisions have consistently been applied. "Our statutes could scarcely be more explicit in abolishing every statutory or common law right or remedy against the employer not provided by the Workmen's Compensation Act, accruing to any person whomsoever, which arises by reason of such injury."

The plaintiffs, for their part, cite us to Pedrazza v. Sid Fleming Contractor, Inc., 94 N.M. 59, 607 P.2d 597 (1980). The basic facts in that case are the same as in this case: The workman was killed while working. The natural mother of his children filed a complaint, in their behalf, for benefits under our Workmen's Compensation Act. The children were residents of the Republic of Mexico. The employer moved for dismissal claiming that the children were precluded from recovery by reason of § 52-1-52. The trial court granted the motion and our Supreme Court affirmed, despite a challenge to § 52-1-52 on due process and equal protection grounds. In so ruling, our Supreme Court had this to say:

> It is important to note the exclusive nature and operation of workmen's compensation. If an employer and employee are covered by the Act, all their rights and remedies are defined exclusively by the Act. § 52-1-9, N.M.S.A. 1978. As between the employer and the employee, all other common law and statutory actions are barred by the Act. This bar also applies to the employee's dependents to the extent that they are covered by the Act.

Pedrazza, supra at 61, 607 P.2d at 599 [Emphasis added.]

> This opinion does not deny plaintiffs other avenues of recovery. The worker and his dependents are independent of and take separately from one another under the Act. Therefore, the bar against using other legal remedies to recover for the injury or death of a worker cannot be raised against those dependents not covered by the Act.

Id. at 63, 607 P.2d at 601 [Emphasis added.]

We, of course, are governed by the precedents of our Supreme Court. Alexander v. Delgado, 84 N.M. 717, 507 P.2d 778 (1973). The defendant contends that the above quoted language is mere dictum and need not be followed in this case. We do not, however, consider the language to be in the category of mere dictum. Rather, it seems to us that the notion that the opinion would not necessarily foreclose other forms of recovery by non-resident alien dependents was the key to the Supreme Court's decision upholding the bar to recovery of Workmen's Compensation. Under these circumstances, we give serious consideration to the language of the Supreme Court in Pedrazza. While perhaps not essential to the decision, it is nonetheless an expression of the views of a majority of our Supreme Court who deemed the matter of sufficient importance to merit discussion. We choose to follow the lead of our Supreme Court and hold that our Workmen's Compensation Act does not bar this wrongful death action.

Some additional comments regarding the nature of a claim under our Wrongful Death Act, Sections 41-2-1, et seq., N.M.S.A. 1978, and rules governing statutory construction are necessary. The wrongful death statute serves two important functions - deterrence and compensation.

> [O]ur Death by Wrongful Act Statute has to some degree an objective of public punishment and was designed in part at least to act as a deterrent to the negligent conduct of others and thereby promote the public safety and welfare.

Trujillo v. Prince, 42 N.M. 337, 78 P.2d 145 (1938).

> [A]n action for wrongful death . . . belongs to the beneficiaries and is designed to compensate for the loss of the relational interest existing between the beneficiaries and the deceased. . . . [T]he action for wrongful death has for its purpose the compensation of the survivors for the loss of benefits caused by the death of the deceased, and does not belong to the estate of the deceased or become an asset thereof.

Wurtzinger v. Jacobs, 148 N.W. 2d 86 (Wis. 1967). See also Varney v. Taylor, 77 N.M. 28, 419 P.2d 234 (1966).

New Mexico's Wrongful Death Act was enacted in 1882 and our Workmen's Compensation Act in 1929.

> In interpreting a statute this court may presume that the legislature was informed as to existing law, and that the legislature did not intend to enact a law inconsistent with any existing law . . . .

City Commission of Albuquerque v. State, 75 N.M. 438, 405 P.2d 924 (1965).

When two statutes cover the same subject matter, and they are capable of co-existing, then it is our duty to give effect to both. City Commission of Albuquerque v. State, supra. We believe both our opinion allowing common law recovery herein and the Supreme Court's opinion in Pedrazza do exactly this.

POINT II: The court's instruction allowing the jury to award damages without proof of monetary loss incorrectly stated New Mexico law.

The instruction referred to reads as follows:

> If you find for the Plaintiff on the issue of liability, you must decide the amount of damages which would compensate for the monetary worth of the life of decedent had it continued.
>
> In fixing damages, you should consider: (1) The monetary loss, or lack of it, to the family, but damages may be recovered without proof of such monetary loss; (2) The age, earning capacity, health, habits

> and probable duration of life of the decedent; (3) The monetary value of the personal services of the decedent to the family; (4) The aggravating or mitigating circumstances attending the conduct which results in death.
>
> The weight to be given to the evidence upon such issues is for you to determine. It is your responsibility to award such damages as may be fair and just to both sides under all the circumstances of this case.
>
> In fixing damages, deductions must be made from gross earnings or earning capacity, if any, for income taxes, social security taxes, other taxes and personal living expenses of the decedent.
>
> Damages for future loss of money will be paid in lump sum; and a reasonable discount should be made for the future earning power of such lump sum.
>
> You may not consider:
>
> (1) The loss of decedent's society to the family;
>
> (2) The grief or sorrow of the family; or
>
> (3) The property or wealth of the survivors or the Defendant.
>
> Your verdict must be based on evidence, not upon speculation, guess, or conjecture. You must not permit the amount of damage to be influenced by sympathy or prejudice.

Defendant correctly points out that at the time of trial there was no uniform jury instruction on damages in a wrongful death case. The instruction given by the trial court was a modification of a draft of proposed U.J.I. 18.30, which was subsequently adopted in large part by the Supreme Court. The controversy in this appeal concerns the part that was not so adopted. It is found in the last clause of the first subparagraph (1) of the court's instruction and reads: "but damages may be recovered without proof of such monetary loss." It should also be noted that the trial court deleted from U.J.I. 18.30 the bracketed elements of damages not relevant to this case, thus only instructing the jury on the element of the monetary worth of the life of the decedent.

The defendant contends that the allowance of damages without proof of monetary loss is contrary to New Mexico law. Further, it contends that the offending portion of the instruction was confusing and misleading to the jury. As support for its contentions, the defendant points to the fact that the language was deleted when U.J.I. 18.30 was adopted.

The fact that the jury instruction adopted by the Supreme Court differs from that given by the trial court does not ipso facto make the latter incorrect. The questions to be answered are: (1) was the questioned section a correct statement of the law; and (2) was it, when read in conjunction with the other parts of the instruction, inconsistent and therefore possibly misleading or confusing? The answer to both questions is NO. The case of Stang v. Hertz Corporation, 81 N.M. 348, 467 P.2d 14 (1970) gives the answer to the first question. There, the Court said:

> . . . [Section] 22-20-3, supra [Section 41-2-3, NMSA 1978], clearly permits recovery by other than a statutory beneficiary, and recovery may be had even though there is no pecuniary injury to a statutory beneficiary. Damages are recoverable by proof of the worth of the life of the decedent, even though there is no kin to receive the award.
>
> . . . .
>
> The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrongdoer.
>
> . . . .
>
> . . . [T]he more reasonable construction of our statute [is] to the effect that substantial damages are recoverable without proof of pecuniary loss.

Thus, the subparagraph complained of was not an incorrect statement of the law.

As to the second question it is our opinion that the language is plain and unambiguous and conveys a clear and definite meaning. Moreover, jury instructions are to be read as a whole and if when

so read, they fairly reflect the issues and law applicable thereto there is no reversible error. Roybal v. Lewis, 79 N.M. 227, 441 P.2d 756 (1968). When so read, the court's damage instruction was proper in all respects. The first paragraph informed the jury that the measure of damages was the monetary worth of the life of the decedent. The next paragraph told the jury four factors to consider in fixing such monetary worth. There followed several paragraphs of caveats cautioning the jury to be fair and not to speculate. Most importantly of all, the instruction explicitly told the jury not to consider such intangibles as loss of society or grief. The instruction, when considered as a whole, effectively put a "brake" on what elements of damages the jury could consider. Hence, no error occurred.

POINT III: The F.E.L.A. [Federal Employees Liability Act] does not apply to this action, and the court erred in giving the jury instructions designed for F.E.L.A. cases.

The three instructions complained of read as follows:

INSTRUCTION NO. 11

> It was the continuing duty of the defendant, as an employer, at the time and place in question, to use ordinary care under the circumstances there existing, to furnish the plaintiff with a reasonably safe place in which to work, and to use ordinary care under the circumstances, to maintain and keep the place of work in a reasonably safe condition. This does not mean, of course, that the employer is a guarantor or insurer of the safety of the place to work. The extent of the employer's duty is to exercise ordinary care, under the circumstances, to see that the place in which the work is to be performed is reasonably safe.

INSTRUCTION NO. 12

> It was the duty of the Defendant Kent Nowlin Construction Company to use ordinary care to provide its employees with safe tools and machinery and appliances with which to do their work and keep them in a safe condition. In exercising ordinary care, the corporation need not necessarily provide the latest or best tools, machinery and appliances which could have been provided to do the work.

INSTRUCTION NO. 13

> It was the duty of the Defendant Kent Nowlin Construction Company to exercise ordinary care to provide the Plaintiff with a sufficient number of employees to safely perform the work being done.

Defendant argues that these instructions interjected false issues and were repetitious. Defendant argues that these instructions interjected false issues into the law suit because they are very similar to U.J.I. Civ. 9.12, 9.13 and 9.14 which are to apply only in cases where common carriers by railroad are involved.

> It is well established in this jurisdiction that each party is entitled to an instruction on his theory of the case if he has pled it and there is evidence upon which the theory might be supported.

Mac Tyres, Inc. v. Vigil, 92 N.M. 446, 589 P.2d 1037 (1979). The plaintiff pled negligence, failure to provide a safe place to work, failure to provide safe equipment and failure to provide sufficient employees to safely perform the work. Defendant does not argue that there was no evidence to support the giving of these instructions.

The instructions given were a correct statement of the law and applicable under the facts of this case. Under New Mexico law the master has the duty to furnish the servants in his employ a reasonably safe place in which to work. Padilla v. Winsor, 67 N.M. 267, 354 P.2d 740 (1960). Generally, it is the master's duty to provide his servants reasonably safe and suitable tools and equipment sufficient to do the work contemplated. Brandt v. Richter, 159 N.W. 2d 471 (Iowa 1968).

> It is not open to question that an employer owes a duty to his employee to supply him with tools and appliances that are reasonably safe for the work he assigns him.

Norton v. Lumbra, 238 A. 2d 628 (Vt. 1968).

> It is also the duty of the employer to furnish a sufficient number of men to do the work with reasonable safety to all those engaged in its accomplishment.

Todd v. Watson, 501 S.W. 2d 48 (Mo. 1973).

Nor is the fact that the instructions modeled after the proposed U.J.I. for F.E.L.A. cases error. This Court has recently held that where there are no U.J.I. instructions on an issue, the trial court may use analogous U.J.I instructions as a modeling point. McCrary v. Bill McCarty Construction Co., 92 N.M. 552, 591 P.2d 683 (Ct. App. 1979). It is our opinion that these instructions did not interject a false issue and they were not repetitious.

POINT IV: The liability of the Employer may not be predicated on violations of O.S.H.A. (Occupational Safety & Health Act of 1970, 29 U.S.C.A., §651 et seq.) regulations and the court's instructions allowing the jury to consider those regulations was erroneous.

The instruction complained of told the jury that there were certain federal safety standards in existence at the time of the occurrence which provided that cranes working near electrical lines shall have certain minimum clearance and further provided that an employee be designated to observe such clearances. The instruction concluded by informing the jury that a violation of the standards was evidence the jury could consider with all the other evidence in deciding whether the defendant was negligent.

The defendant complains that the instruction was erroneous because O.S.H.A. itself states that violations of regulations promulgated under it may not be used to create civil liability, 19 U.S.C. § 653 (b)(4). Defendant concedes that the regulations may be used for guidance but asserts that their violation may not in and of itself prove negligence. In making these contentions, the defendant overlooks the basis of the trial court's instruction and mischaracterizes the instruction's directives.

The federal safety standards referred to in the instruction were not only promulgated pursuant to O.S.H.A., but they were also promulgated under the Contract Work Hours and Safety Act. The

work in which defendant was engaged at the time of the accident was contract work. In the contract the defendant explicitly contracted to conform its operation to the standards required by the Contract Work Hours and Safety Act.

> It is well established that a duty of care can arise from a contractual relationship, and a cause of action in tort may sometimes be allowed where there is a failure to perform a contractual duty, or where such duty is negligently performed.

Duff v. Harrah South Shore Corporation, 125 Cal. Rptr. 259 (1975).

> A party may be liable in negligence for the breach of a duty which arises out of a contractual relationship.

Sasso v. Ayotte, 235 A.2d 636 (Conn. 1967). See also Tipton v. Glover, 67 N.M. 388, 356 P.2d 46 (1960).

Moreover, the instruction did not, by any stretch of the imagination, tell the jury that violation of the standards was in and of itself negligence. The instruction merely informed the jury that violation of the standards was a fact that jurors could consider. This is consistent with the defendant's concession that the regulations may be used for guidance and accordingly, defendant's fourth point is without merit.

POINT V: The fellow servant rule barred the plaintiff's claim against the defendant and the trial court erred in refusing to allow the employer to amend its answers and in refusing to instruct the jury with respect to the rule.

The fellow servant rule was adopted in New Mexico in 1892 in the case of Lutz v. Alt. & Pac. R'y Co., 6 N.M. 496, 30 P. 912 (1892):

> . . . [I]t is now the unquestioned law that damages cannot be recovered for injuries sustained by reason of the negligence of fellow servants. Negligence of such servants of a common employer is part of the risk which public policy requires that an employee take in entering upon a service in which there are fellow servants.

From the language of this quotation, it is readily seen that the

fellow servant doctrine is nothing more than a species of assumption of the risk. See also Alternman v. Jinks, 179 S.E. 2d 92 (Ga. App. 1970).

Assumption of risk as an affirmative defense in New Mexico was abolished by our Supreme Court in Williamson v. Smith, 83 N.M. 336, 491 P.2d 1147 (1971). The language used by the Supreme Court in so doing leaves no doubt but that it intended the fellow servant doctrine to be buried in the same grave as the defense of assumption of the risk:

> Assumption risk evolved in master and servant cases. As the United States Supreme Court has observed, it developed in response to the general impulse of the common law courts "to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost--to someone--of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry."
>
> . . . .
>
> The doctrine, being a manifestation of laissez faire economics, was a subject of criticism even during its early years. [Citations omitted.] As Justice Frankfurter later noted in the Tiller case, supra:
>
> > ". . . The notion of assumption of risk as a defense--that is, where the employer concedely failed in his duty of care and nevertheless escaped liability because the employee had 'agreed' to 'assume the risk' of the employer's fault--rested, in the context of our industrial society, upon a pure fiction."
>
> . . . .
>
> The reasonableness of insulating business from human overhead, however valid it may have been during the moment of the industrial revolution, now runs directly counter to current social policy, as typified by the underlying theory of modern workmen's compensation legislation, both general and specifically in regard to the safety of work areas.
>
> . . . .
>
> Finally, in the employer-employee frame of reference, the concept of assumption of risk is one hundred eighty degrees out of phase with our

> legal policy of requiring the employer to provide his employees with a reasonably safe place to work.
>
> . . . .
>
> For these reasons, assumption of risk will no longer be a defense in New Mexico. . . .

In conformity with Williamson we hold that the fellow servant rule is no longer a defense in New Mexico. The trial court did not err in refusing to allow defendant to amend its answer and in refusing to instruct the jury with respect to the rule.

POINT VI: There was no evidence to support the assumption that the decedent's earning capacity was equal to that of a United States citizen employed in construction work and the verdict is therefore not supported by the evidence.

Dr. Everett G. Dillman, an economist and statistician and plaintiff's expert witness, testified first as to his qualifications and then gave a detailed explanation of how he arrived at his opinion of the present value of decedent's earning capacity ($141,000). Defendant's counsel interposed only one objection to this testimony and that objection was sustained. Defendant's counsel did not move that all or any part of Dr. Dillman's testimony be excluded nor did he request that limitations be placed on the purpose for which the testimony could be considered. Defendant's counsel conducted a thorough and searching cross-examination of the basis for Dr. Dillman's opinion and his qualifications and possible bias. Several of the questions asked by defendant's counsel dealt with the fact that decedent was a Mexican national and in this country illegally. These questions did not alter Dr. Dillman's opinion.

It is our opinion that plaintiff's evidence was more than sufficient to create a jury issue. The weight to be given to this evidence was for the jury to decide. We would remind counsel that an expert witness' opinions cannot be questioned for the first

time on appeal when those opinions were admitted at trial without objection or motion to exclude. See Hancock v. Beasley, 14 N.M. 239, 91 P. 735 (1907); Winder v. Martinez, 88 N.M. 622, 545 P.2d 88 (Ct. App. 1975). We would also point out that:

> An illegal alien in the United States is entitled to the same rights to damages that a citizen has under the tort laws of the state and federal government. Low Moor Iron Co., supra. Trotta's Adm'r v. Johnson, Briggs & Pitts, 121 Ky. 827, 90 S.W. 540 (1906) says:
>
> > We treat him [an illegal alien] as a human being, who, if wronged while within our jurisdiction in any personal or property right, may be redressed in our courts according to the laws of this state, giving such measure of compensation as we deem a proper equivalent for the wrong done. [90 S.W. at 541].

Torres v. Sierra, 89 N.M. 441, 553 P.2d 721 (Ct. App. 1976).

The defendant also complains of the excessiveness of the verdict in that it was some $30,000 higher than Dr. Dillman's figures. This complaint is manifestly without merit. Dr. Dillman only testified as to one element on damages in a wrongful death case, i.e. earning capacity. See U.J.I. 18.30. As we noted in Baca v. Baca, 81 N.M. 734, 472 P.2d 997 (Ct. App. 1970), absence of proof of pecuniary injury does not preclude an award of damages.

Finding no error the judgment below is affirmed.

IT IS SO ORDERED.

B. C. Hernandez
CHIEF JUDGE

WE CONCUR:

Lewis R. Sutin J.

J.

JUN 16 1983

No. 82-6614

RECEIVED
APR 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

Supreme Court, U.S.
FILED
APR 13 1983
Alexander L. Stevas, Clerk

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

MICHAEL B. BROWDE
LUIS G. STELZNER
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5326
(Counsel of Record)

WILLIAM H. CARPENTER
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

TIMOTHY SHEEHAN
PO Box 271
Albuquerque, NM 87103
(505) 247-0411

Counsel for Appellants

RECEIVED
APR 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA, DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Come now appellants and move this Court for leave to proceed with an appeal to this Court in forma pauperis. As grounds therefore Appellants allege:

1. Appellant Astrid Galindo Sardoz is the newly appointed Consul for the Mexican Government, who in her official capacity has been substituted for her predecessor in office Estela E. Gutierrez pursuant to Rule 40.3 of the Rules of this Court.

2. The Mexican Consul regularly serves as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and appellant Astrid Galindo Sardoz, as well as her predecessor in office, Estela E. Gutierrez have done so in this cause on behalf of appellant Maria Soto Vda. De Talamantes, who is a non-resident alien and a citizen of Mexico.

3. Appellant Astrid Galindo Sardoz has no personal interest in the present litigation. Her interest, by virtue of her official capacity is to facilitate the perfecting of this appeal on behalf of Maria Soto Vda. De Talamantes, widow of the deceased Bernardo Talamantes.

4. Appellant Astrid Galindo Sardoz has executed the attached affidavit setting forth with particularity facts showing that Mrs. Talamantes falls within the statutory requirements for in forma pauperis status.

5. Leave to proceed in forma pauperis was not sought in any court below.

6. Counsel in this appeal are serving without fee, pro bono publico.

7. Appellants are filing contemporaneously herewith their Jurisdictional Statement.

WHEREFORE, Appellants request that leave be granted for them to proceed with this appeal in forma pauperis.

Respectfully submitted,

MICHAEL B. BROWDE
LUIS G. STELZNER
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5326

WILLIAM H. CARPENTER
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

TIMOTHY SHEEHAN
PO Box 271
Albuquerque, NM 87103
(505) 247-0411

OF COUNSEL

JOAQUIN G. AVILA
MORRIS J. BALLER
JOHN E. HUERTA
Mexican American Legal
Defense and Education Fund
28 Geary Street
San Francisco, CA 91204

Counsel for Appellants

RECEIVED
APR 15 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ASTRID GALINDO SARDOZ, being duly sworn, depose and state:

1. I am the Mexican Consul, with offices situated in Albuquerque, New Mexico.

2. As a regular part of my duties on behalf of the Government of Mexico I regularly serve as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and that I am serving in that capacity on behalf of Maria Soto Vda De Talamantes, who is the real party in interest in this action.

3. Maria Soto Vda De Talamantes is a citizen of Mexico,

and she resides in the small village of Via Coronado in the State of Chihuahua, Mexico.

4. Mrs. Talamantes is thirty-six years old; she is the widow of Bernardo Talamantes who was killed in an industrial accident in the United States. That accident and Mrs. Talamantes' claim against the American employer are the subject matter of this action.

5. Mr. and Mrs. Talamantes had six children.

6. At the time of the accident which gave rise to this action, Mrs. Talamantes and her six children relied exclusively for support and maintenance upon the wage earning and labor of her husband Bernardo Talamantes.

7. Since her husband's death, Mrs. Talamantes and her children have been able to maintain themselves only through the minimal income received from her menial labor and the good graces and charity of their friends and neighbors in Via Coronado.

8. As a result of the foregoing Mrs. Talamantes is unable to pay the costs or give security for the payment of the costs of this appeal.

9. This action involves a federal constitutional challenge to the New Mexico Workman's Compensation Act, N.M. Stat. Ann. § 52-1-1 et seq. (1978), as interpreted by the New Mexico Supreme Court in the action below.

10. This appeal is taken in good faith under a belief that Mrs. Talamantes is entitled to relief.

Astrid Galindo Sardoz

Subscribed and sworn to before me this 11th day of April, 1983.

Ethel R. Ortenburger

Notary Public

My commission expires:
8-9-86

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA. DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April, 1983, a copy of the foregoing Motion for Leave to Proceed in Forma Pauperis was mailed with first class postage prepaid to Zachary L. McCormick, Counsel for Defendant, at Modrall, Sperling, Roehl, Harris & Sisk, PO Box 2168, Albuquerque, NM 87103 and to the Attorney General of the State of New Mexico, Paul Bardacke, PO Drawer 1508, Batann Memorial Building, Santa Fe, NM 87503.

Respectfully submitted,

MICHAEL B. BROWDE
LUIS G. STELZNER
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-5326

WILLIAM H. CARPENTER
509 Roma, NW
Albuquerque, NM 87102
(505) 243-1336

TIMOTHY SHEEHAN
PO Box 271
Albuquerque, NM 87103
(505) 247-0411

Counsel for Appellants

RECEIVED
APR 25 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 82-6614

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ASTRID GALINDO SARDOZ and MARIA SOTO VDA DE TALAMANTES as co-personal representatives of the Estate of BERNARDO TALAMANTES, a/k/a HECTOR M. BAYLON, deceased,

Appellants,

vs.

KENT NOWLIN CONSTRUCTION COMPANY,

Appellee.

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

STATE OF NEW MEXICO)
) ss
COUNTY OF BERNALILLO)

I, ASTRID GALINDO SARDOZ, being first duly sworn, depose and say that I am an Appellant in the above-entitled case. In further support of our motion to proceed on appeal without being required to prepay fees, costs or give security therefore I state:

1. I am the Mexican Consul, with offices situated in Albuquerque, New Mexico.

2. As a regular part of my duties on behalf of the Government of Mexico I regularly serve as personal representative for non-resident Mexican citizens who wish to invoke the jurisdiction of American courts, and that I am serving in that capacity on behalf of Maria Soto Vda De Talamantes, who is the real party in interest in this action.

3. Maria Soto Vda De Talamantes is a citizen of Mexico, and she resides in the small village of Villa Coronado in the State of Chihuahua, Mexico.

4. Because of Mrs. Talamantes' poverty she is unable to pay the costs of said proceedings or to give security therefore. I believe she is entitled to redress in this action.

I further swear that the responses which I have made to the questions and instructions below relating to Mrs. Talamantes' ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed?

No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

Mrs. Talamantes takes in washing and does odd jobs in the village of Villa Coronado. Her compensation is primarily in food and hand-me-down clothing and school supplies for her minor children. She receives very little in cash income, and never more than the equivalent of $10 per month.

3. Do you own any cash or checking or savings accounts?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

Maria de los Angeles Talamantes	- daughter
Rita Talamantes	- daughter
Norma Susana Talamantes	- daughter
Juan Bernardo Talamantes	- son
Antonio Talamantes	- son
Jose Roman Talamantes	- son

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Astrid Galindo Sardoz

Subscribed and sworn to before me this 20th day of April, 1983.

Notary Public

My commission expires:

January 19 1986